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STATEMENT OF FACTS

On March 21, 2003, a jury found Relator guilty of Murder in the First Degree for the murder of Trisha Blue. (A2). On March 24, 2003, the same jury returned a verdict

stating that it had unanimously found four statutory aggravating circumstances beyond a reasonable doubt but was unable to agree on punishment. (A5). Respondent discharged the jury, granted Relator an additional ten days to file a motion for a new trial and set sentencing for May 23, 2003. (A2, A6).

On April 16, 2003, Relator filed a Motion for Judgment of Acquittal, or in the Alternative, Motion for New Trial ("April 16 Motion"), wherein Relator, in his prayer for relief, alleged 138 points of error and requested the Respondent to:

> [D]ischarge him and to grant him a judgment of acquittal, or in the alternative, to sentence him to life imprisonment in the Missouri Department of Corrections without the possibility for probation or parole, or in the alternative, to grant him a new trial, or in the alternative, to grant him a new penalty phase hearing. (A7).

On May 19, 2003, Respondent set Relator's April 16 Motion for hearing on June 12, 2003, and continued the sentencing from May 23 to June 19, 2003. (A9). On June 12, 2003, Respondent heard arguments on the April 16 Motion and took the matter under submission. (A10). On June 17, 2003, which was the date that this Court handed down its opinion in State v. Whitfield, 107 S.W.3d 253 (Mo. banc 2003), Relator filed a Second Supplemental Motion for Judgment of Acquittal or in the Alternative Motion for New Trial or Motion for the Trial Court to Sentence Barry Baker to Life ("June 17 Motion"). (A11 – A14). Despite the title of this pleading, Relator was not requesting a judgment of acquittal or a new trial; rather, Relator specifically cited Whitfield and requested

Respondent, pursuant to that contemporaneous opinion, to sentence him "to life in prison without the possibility of probation or parole." (A12 – A13, A37 – A38).

On June 19, 2003, Relator filed an Amended Second Supplemental Motion for the Trial Court to Sentence Barry Baker to Life in Prison without the Possibility of Probation or Parole Relator ("June 19 Motion"). (A15 – A20). Despite the title of this pleading, Relator was not requesting a judgment of acquittal or a new trial; rather, Relator specifically cited Whitfield and requested Respondent, pursuant to that contemporaneous opinion, to sentence him "to life in prison without the possibility of probation or parole." (A19, A37 – A38). In light of Whitfield, Respondent granted the parties the opportunity to file memorandums of law regarding the June 19 Motion and continued the case for oral argument on the June 19 Motion to August 13, 2003. (A21).

After hearing argument on August 13, 2003, Respondent continued the case to September 11, 2003, for sentencing or to schedule a new trial. (A22). On September 11, 2003, Respondent denied Relator's April 16 Motion as to guilt phase and ordered a new penalty phase trial not based on Relator's April 16 Motion, but rather *sua sponte* citing the recent opinion in State v. Whitfield, 107 S.W.3d 253 (Mo. banc 2003). (A4, A23 – A25).

ARGUMENT

1. **Relator is not entitled to an order prohibiting Respondent from ordering a new trial or an order requiring Respondent to sentence Relator to life without eligibility for probation or parole because Respondent has not unconstitutionally made any factual determinations regarding aggravating and mitigating circumstances and has not unconstitutionally *imposed* a death sentence, because the Respondent's Instructions complied with Ring v. Arizona, 536 U.S. 584 (2002), and because MO. REV. STAT. Section 565.030.4 (2000) does not require it.**

Relator's arguments that Respondent, under State v. Whitfield, 107 S.W.3d 253 (Mo. banc 2003), should be prohibited from ordering a new penalty phase trial and should be ordered to sentence Relator to life imprisonment without the eligibility for probation or parole are without merit. In Whitfield, 107 S.W.3d at 272, this Court, in a motion to recall the mandate, vacated the defendant's sentence of death entered by a trial court judge after a jury was unable to agree on punishment. This Court, in applying Ring v. Arizona, 536 U.S. 584 (2002), held that the defendant's death sentence was "unconstitutional because it violated his right to be sentenced on determinations made by a jury." Id. at 271. Specifically, this Court held that defendant's death sentence was unconstitutional because the trial court entered a death sentence against the defendant where the jury did not explicitly find that aggravating circumstances existed, that the aggravating circumstances warranted death, or that mitigating circumstances did not outweigh aggravating circumstances. Id. at 261-62, 271.

In its analysis, the Court narrowed its application of Ring to "all future death penalty cases and to those not yet final or still on direct appeal." Id. The Court stated that it was limiting its application of Ring and its decision to five listed cases, "only those few Missouri death penalty cases that are no longer on direct appeal and in which the jury was unable to reach a verdict and the judge made the required factual determinations and imposed the death penalty…."

Ultimately, the Court, in ordering the trial court to re-sentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the

governor, relied on MO. REV. STAT. Section 565.040.2 (2000), which provides in pertinent part:

> In the event that any death sentence *imposed* pursuant to this chapter is held to be unconstitutional, the trial court which previously sentenced the defendant to death shall cause the defendant to be brought before the court and shall sentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor.... (A50).

In this case, neither the plain language of MO. REV. STAT. Section 565.040.2 (2000), nor Whitfield or Ring, prohibit Respondent from ordering a new penalty phase trial or require Respondent to sentence the defendant to life without eligibility for probation, parole, or release except by act of the governor because Respondent has not unconstitutionally made any factual determinations regarding aggravating and mitigating circumstances and has not unconstitutionally *imposed* a death sentence.

Moreover, neither Whitfield nor Ring nor MO. REV. STAT. Section 565.030.4 (2000) prohibit Respondent from ordering a new penalty phase trial or require Respondent to sentence the defendant to life without eligibility for probation, parole, or release except by act of the governor when a jury hangs as to punishment because the Respondent's Instructions complied with Ring. (A48 – A49). In Ring v. Arizona, 536 U.S. 584, 609 (2002), the Court struck down Arizona's sentencing scheme wherein the trial judge alone, upon a finding of guilt, determined the existence of an aggravating circumstance. The United States Supreme Court held that Arizona's capital sentencing

scheme violated the Sixth Amendment jury trial guarantee because it entrusted a judge, and not a jury, with this finding of fact, which raised a defendant's maximum penalty. Id.

In this case, the submission of Instructions 16 (MAI-CR3d 313.40), 17 (MAI-CR3d 313.41A), 18 (MAI-CR3d 313.44A), and 20 (MAI-CR3d 313.48A), as well as the verdict form for "unable to decide or agree on the punishment," demonstrates that Respondent complied with Ring and that the jury alone made the requisite findings of fact. (A26 – A33). Instruction 16 addressed the jury's finding of aggravating circumstances, informing the jury that if they did not "unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing statutory aggravating circumstances exist," they must return a verdict of life imprisonment. (A28). Ultimately, not only did the jury foreperson sign the verdict form indicating that they were "unable to decide or agree upon the punishment" and that they had unanimously found the listed statutory aggravating circumstances beyond a reasonable doubt, the jury foreperson had written behind each numbered aggravating circumstance the word "unanimous." (A5).

Instruction 17 informed the jury that if they did not "unanimously find from the evidence that the facts and circumstances in aggravation of punishment warrant the imposition of death as defendant's punishment," they must return a verdict of life imprisonment. (A29). Accordingly, the fact that the jury did not return a verdict of life

imprisonment signifies that it unanimously found that the circumstances in aggravation of punishment warranted the death penalty.

Instruction 18 stated that "it is not necessary that all jurors agree upon the facts and circumstances in mitigation of punishment," and if each juror determined "that there are facts and circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment," the jury must return a verdict of life imprisonment. (A30 – A31). Accordingly, the fact that the jury did not return a verdict of life imprisonment signifies that each juror determined that there were not facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment.

Instruction 20 essentially restated Instructions 16 and 17 and directed that if the jury was "unable to unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt," or if they were "unable to unanimously find that there are facts and circumstances in aggravation of punishment which warrant the imposition of the sentence of death," then the verdict must be life imprisonment. (A32 – A33). Furthermore, Instruction 20 states that if the jury "unanimously finds the matters describe in Instruction No. 16 and 17, but are unable to agree upon the punishment, [the] foreperson will sign the verdict form stating that [they] are unable to decide or agree upon the punishment," in which case "the foreperson must write into [the] verdict the statutory aggravating circumstances submitted in Instruction No. 16…", which is exactly what the jury did in the case at bar. (A33). Accordingly, the fact that

the jury in this case did not return a verdict of life imprisonment signifies that it unanimously found the existence of at least one statutory aggravating circumstance beyond a reasonable doubt," and found the circumstances in aggravation of punishment warranted the death penalty.

Furthermore, these Instructions comply with MO. REV. STAT. Section 565.030.4 (2000), which does not prohibit Respondent from ordering a new penalty phase trial. (A48 – A49). MO. REV. STAT. Section 565.030.4(4) (2000) provides that a trial court is authorized to sentence a defendant to life imprisonment without eligibility for probation or parole "… (4) If the trier decides under all of the circumstances not to assess and declare the punishment at death." Accordingly, under MO. REV. STAT. Section 565.030.4(4) (2000), a trier may sentence a defendant to life imprisonment without eligibility for probation or parole only if it affirmatively decides not to impose death. Here, the jury, by failing to agree on punishment, could not agree on the decision to not impose death. Therefore, MO. REV. STAT. Section 565.030.4 (2000) does not require Respondent to sentence Relator to life imprisonment without eligibility for probation or parole, and Respondent's ordering of a new penalty phase trial was proper.

Finally, and admittedly, Respondent's penalty phase verdict form Instructions, although compliant with Ring, did not wholly comply with Whitfield. Other than the "unable to decide or agree upon the punishment" verdict form wherein the jury explicitly stated that it had unanimously found that aggravating circumstances existed, the verdict forms did not include an explicit statement by the jury that the aggravating circumstances

warranted death, or that mitigating circumstances did not outweigh aggravating circumstances. This Court has held that a new penalty phase trial is appropriate and permissible when there is a penalty phase instructional error. *See* State v. Mayes, 63 S.W.3d 615 (Mo. banc 2001); *see also* State v. Storey, 986 S.W.2d 462 (Mo. banc 1999). Accordingly, the penalty phase verdict form instructional error, coupled with the hung jury, authorizes Respondent to order a new penalty phase trial.

2. **Relator is not entitled to an order prohibiting Respondent from ordering a new trial because Missouri Supreme Court Rules 29.13(b) and 29.11(g) are inapplicable in that there was no penalty phase verdict, Respondent had not exhausted his jurisdiction, and Respondent's order was *sua* sponte, pursuant to State v. Whitfield, 107 S.W.3d 253 (Mo. banc 2003), and not pursuant to Relator's filed motions.**

Relator's arguments that Respondent lacked jurisdiction to order a new trial because the thirty-day time period under Missouri Supreme Court Rule 29.13(b) and the ninety-day time period under Missouri Supreme Court Rule 29.11(g) had lapsed are without merit because neither rule applies. Rule 29.13(b) provides in pertinent part: "The trial court may, with the consent of the defendant, order a new trial of its own initiative before the entry of judgment and imposition of sentence but not later than thirty days after the *verdict* of the jury is returned." Here, there was no penalty phase verdict to prompt the beginning of the running of the thirty-day time period; the jury was unable to agree upon punishment and consequently, failed to return a penalty phase *verdict* (A5).

Nevertheless, Respondent's decision-triggering event, which did not occur prior to or during that initial thirty-day time period, was this Court's opinion in State v. Whitfield, 107 S.W.3d 253 (Mo. banc 2003), issued after the thirty-day period had run. For that reason, Relator's Point Two argument contradicts not only his June 17 Motion and his June 19 Motion, but also his Point One argument: in Point One, Relator argues that this

Court should order Relator to follow Whitfield and sentence Relator to life without the possibility of probation or parole because Whitfield compels Relator to do so; in Point Two, on the other hand, Relator argues that Respondent should have ignored Whitfield, should have ignored Relator's motions under Whitfield, should not have provided the parties the opportunity to research and argue the impact of this opinion, and accordingly, should have continued to consider sentencing Relator to life without the possibility of probation or parole or death, for the sole reason that this Court issued the Whitfield opinion after the thirty days had run. Under Relator's theory, a trial court, which had not exhausted its pre-judgment and pre-sentence jurisdiction, must ignore any appellate opinions issued after the thirty-day time period has run, even those opinions which directly impact the case at hand.

Nevertheless, the timing of Whitfield beyond the thirty days pursuant to Rule 29.13(b) is irrelevant under Relator's theory. Under Relator's theory, if this Court had issued Whitfield during the initial thirty-day time period, Respondent would have been powerless under Rule 29.13(b) to order a new trial because Relator, as demonstrated by his motions pursuant to Whitfield, would not have "consented" to the ordering of a new penalty phase trial.

Rule 29.11(g) is also inapplicable. Rule 29.11(g) refers only to "*filed* motions" and provides in pertinent part: "If the *motion* for new trial is not passed on within ninety days after the motion is *filed*, it is denied for all purposes." Here, Respondent had not exhausted his jurisdiction because there was no final judgment. *See* Simmons v. White,

866 S.W.2d 443, (Mo. 1993); *see also* State ex. rel. Wagner v. Ruddy, 582 S.W.2d 692 (Mo. 1979). Also, Relator was the only party who filed a motion for a new trial and although Respondent issued its order more than ninety days thereafter, Respondent's order of a new penalty phase trial was not based upon that April 16 Motion, or any other "*filed* motion," but rather was prudently *sua sponte* based upon this Court's contemporaneous June 17, 2003 opinion in State v. Whitfield, 107 S.W.3d 253 (Mo. banc 2003). Additionally, Rule 29.11(g) does not apply because Relator effectively withdrew his motion for a new penalty phase trial by filing his June 17 Motion and June 19 Motion pursuant to Whitfield. In fact, on August 13, 2003, Relator explicitly stated that his June 17 Motion and his June 19 Motion were not, despite their titles, motions for judgment of acquittal or motion for a new trial, but were motions, pursuant to Whitfield, for Respondent to sentence Relator to life without the possibility of probation or parole. (A37 – A39). Accordingly, Respondent's ordering of a new penalty phase trial on September 11, 2003 was proper.

CONCLUSION

This Court should not issue an order prohibiting Respondent from ordering a new penalty phase trial and should not issue an order mandating Respondent to sentence Relator to life without the possibility of probation or parole, and Relator's Writ of Prohibition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned Assistant Prosecuting Attorney hereby certifies that:

1. The attached brief includes information required under Rule 55.03 and complies with the limitations contained in Rule 84.06(b) in that it contains 3,004 words, excluding the cover, signature block, this certification, and appendix, as determined by Microsoft Word 2000 word count software; and

2. The floppy disk, which contains a copy of this brief, filed with this Court, has been scanned for viruses and is virus-free; and

3. A copy of this brief and a floppy disk containing this brief, were hand-delivered on February 9, 2004, to:

The Honorable Larry Kendrick
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